



Vulnerable Witnesses

By Sean Larkin, 2 September 2007

'The learned judge has the duty ... to see that justice is done. Those are high-sounding words. What it really means is, he has got to see that the system operates fairly: fairly not only to the defendants but ... also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies.'

- Lord Lane CJ, X, Y and Z (1990) 91 Cr App R 36

Importance of witnesses generally

Witnesses are at the heart of our legal and regulatory system. Notwithstanding the increase in other forms of evidence: documents, scientific evidence e.g. DNA, moving and still photographic evidence, witnesses make a vital contribution, if not the most vital contribution to court and tribunal hearings.

The reason for such importance is twofold: firstly, witnesses give a direct, first-hand account of what they saw and heard [I exclude experts from this point]. If the witness is the complainant, the Panel hear not just the witness' record of events but the effect upon the witness of those events.

Secondly, live witnesses provide legitimacy to the proceedings. We expect to hear witnesses. We empathise with fellow human beings providing their 'story'. The hearing is usually open. The witness assists the fact-finder and is be tested by defence advocates. Little doubt would be cast about a process in which the independent fact-finder considered the evidence of live witnesses with direct intimate knowledge of the relevant facts.

Even if there are flaws in using witnesses [more later] but oral evidence remains and will continue to remain a crucial part of our system and increasingly, part of the inquisitorial system.

One would assume that as well as having such a responsibility witnesses would enjoy rights. One would assume that our system would be designed to accommodate the witness. Unfortunately, study after study has found that witnesses seldom find giving evidence a positive experience (Rock 1993; Stafford and Asquith 1992; Goodman et al. 1992). The role of the witness can be a demanding and stressful one. Complaints that have been made include:

QEB Hollis Whiteman Barristers

Queen Elizabeth Building, Temple, London EC4Y 9BS

DX LDE 482 Telephone 020 7583 5766 Fax 020 7353 0339

barristers@qebholliswhiteman.co.uk www.qebholliswhiteman.co.uk

- Having to arrange their lives to make themselves available to give evidence
- Being left to wait for long periods prior to giving evidence
- Having to relive what may have been particularly traumatic or unpleasant events in front of strangers in unfamiliar surroundings
- Giving their account based on recollection of events that took place some time ago [albeit there may be some assistance from a witness statement or documents]
- Uncertainty about the laws of evidence and procedure that they do not understand
- Not knowing what they can and can't do
- Aggressive and intensive cross-examination
- Guidance about what is likely to happen or explanations for the decisions and outcome in their case.

What I would like to consider are the mechanisms by which better evidence can be adduced and witnesses can have a better experience. Particular emphasis will be put on those who fall within the category of vulnerable witness.

The problems with evidence from witnesses

In order to assess how a witness may best be assisted, it is important to realise what dangers may exist with witness testimony. Our current system predominantly relies on witnesses recalling events. They may be assisted by documents contemporaneous to the time. They will have had the opportunity to re-read their witness statement. They may be permitted to refresh their memory from the statement in the course of giving evidence using the provisions of the Criminal Justice Act 2003. Notwithstanding such assistance, memory is crucial.

There are two particular problems with memory. Studies have confirmed what is perhaps obvious. Firstly, memories diminish with the passage of time. Secondly, stress beyond a certain level can impair the power of recall.

I will consider the effect of the passage of time. Recall of an event from memory requires accuracy at three important stages. At any of the stages there may be a failure:

- Acquiring the memory
- Retaining the memory
- Recalling the memory

Information may be lost entirely. It may be misremembered. The mind may subconsciously fill in gaps in the memory and 'remember' them as real. If asked to recall the memory more than once there may be unconscious assimilation of the reaction of listeners [be they family, friends, employers, investigating authorities, the hearing] who may approve or disapprove particular passages.

The more that time passes, the greater the risk of such an event occurring.

The second problem is the effect of stress. The greater the stress, the greater the problem. We

have all experienced the feeling of the mind going blank only to remember something at our leisure sometime afterwards.

Bearing those concerns in mind, if you wished to devise the best possible system for obtaining an account from a witness you would probably emphasise the following features: allow the witness to give their account, in their own manner, without any stress as soon as possible after the event. Questions would be open-ended. Time would be allowed. That account would be the evidence.

With the exception of the pre-recorded video interview, those features are not common in our system.

If a witness is denied the opportunity to give their best evidence, there is a danger that the honest witness may appear to be unreliable due to gaps in his memory. It should further reduce the opportunity for the honest witness to make mistakes.

This does not prevent proper and vigorous testing of the account. It permits the witness to give the best account that they wish to give. I consider the effect of cross-examination as a separate topic.

Cross-examination

We are all aware that when cross-examining advocates act within legal and professional constraints. The tensions in the role is explained well by Lord Sankey LC who stated

'Cross-examination becomes indefensible when it is conducted... without restraint and without the courtesy and consideration that a witness is entitled to expect in a Court of Law.'

And endorsed the following comment of Lord Hanworth MR:

'Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the fact-finder not forgetting at the same time the burden upon the witness.'

The tension that exists is that between the duty of the advocate to vigorously test and challenge the prosecution case without crossing the line into unnecessary or offensive questioning. That is usually left to the good judgement of the advocate.

The study 'In Their Own Words' a survey of 50 young witnesses found that a third had vulnerabilities that had not been picked up and brought to the attention of the courts at any stage in the proceedings; two thirds felt sick, scared or upset during cross-examination and found counsel to be rude, sarcastic or aggressive; a quarter did not feel they were able to tell the court everything they wanted, half did not understand some questions and a third thought that questions

were too long and complicated or repetitive or jumped around in time. 52% felt they were treated fairly.

Judicial management was positive but the study concluded that judges should be more vigilant to rule out questioning that lacks relevance, is repetitive, oppressive or intimidating and suggested training.

If the advocate strays, who is responsible for ensuring they return to the proper path. In the courts it is the function of the judge. There is little doubt that in the past few years there has been a sea-change in the approach of the judge. No longer the umpire occasionally blowing the whistle, he is the case manager whose function is to identify the issues early on, focus the attention of the parties on these issues and streamline the trial so as to shorten it. This may include time limits for examination and cross-examination of witness. The Court of Appeal spelled out this approach in the cases of *R v Jisl* [2004] EWCA Crim 696 and *R v Chaaban* [2003] EWCA Crim. 1012 but this has been formalised by the various procedure rules.

The effect of the judge can be significant. In the survey witnesses commented positively where judges had intervened and were helpful.

But how does this spill into regulatory proceedings. Unfortunately, not particularly well. For example, the case management protocols introduced by the GMC have been welcome are nowhere near as effective as the court procedures. There is no meaningful sanction and directions often ignored.

Who bears the responsibility of managing the hearing, curtailing cross-examination and, if needs be, reprimanding the advocate. Obviously, the Chairman, but he may have limited legal experience and may feel reluctant to intervene particularly with more senior advocates. The Legal Assessor, who has an advisory role not best suited to managing the hearing. The prosecution advocate is reluctant to intervene until a very late stage.

Vulnerable witnesses - definitions

Eligibility for special measures is clearly a key aspect of any protective legislation. Initially in most adversarial systems only child witnesses were permitted to depart from the usual mode of giving evidence, with all other witnesses required to be physically present in the courtroom, standing in the witness box and able to see and be seen by the accused. Over time a much broader definition of eligibility has been adopted, encompassing the witness's personal characteristics, vulnerability arising from the nature or circumstances of the offence and the exposure of the witness to intimidation as the result of giving evidence.

A recent review of provisions for vulnerable witnesses in a variety of jurisdictions notes that the term 'vulnerable witness' is used 'to identify those witnesses who, for a range of reasons, face particular barriers to giving evidence ... it is the process itself which renders them "vulnerable"' (Reid Howie 2002). This definition is to be welcomed, as it emphasises the responsibility of the legal system to adjust its practices and procedures to suit witnesses' different circumstances and

acknowledges the distress and trauma that giving evidence may cause to certain witnesses. A more flexible approach should also enable witnesses to give evidence who otherwise might not be able to do so or who would be unable to provide comprehensive, accurate accounts under the normal conventions. Research undertaken in England and Wales in the 1990s demonstrated that witnesses whose vulnerability stemmed from personal characteristics (for example, learning disabilities) were often excluded from the criminal justice process since their evidence was regarded as unreliable or difficult to obtain (Sanders et al. 1996). This discriminatory approach contrasted with the pressure put on other witnesses to give evidence, regardless of their obvious reluctance or distress.

Health regulators define vulnerable witnesses in a similar way to the criminal courts. The GMC, GDC and GOC use the following definition¹, similar but not identical to the Youth Justice and Criminal Evidence Act 1999²:

- (a) any witness under the age of 17 at the time of the hearing (18 for GDC);
- (b) any witness with a mental disorder within the meaning of the Mental Health Act 1983 [means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind];
- (c) any witness who is significantly impaired in relation to intelligence and social functioning;
- (d) any witness with physical disabilities who requires assistance to give evidence;
- (e) any witness, where the allegation against the practitioner/registrant is of a sexual nature and the witness was the alleged victim; and
- (f) any witness who complains of intimidation.

There are two significant differences between the YJCE and the various Rules. Firstly, the criminal courts require an additional stage for witnesses with incapacity namely the court has to consider if the quality of evidence given by the witness is likely to be diminished by reason of the incapacity.

The definition of quality of evidence is contained within section 16(5) which states that quality of a witness's evidence are to quality in terms of completeness, coherence and accuracy and 'coherence' refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

The second significant difference is that assistance can be provided if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear [regulatory have the intimidation aspect which has occurred] or distress in connection with testifying in the proceedings. There is considerable difference between being in fear and being distressed.

1 The General Medical Council (Fitness to Practise) Rules Order of Council 2004, Rule 36; The General Dental Council (Fitness to Practise) Rules Order of Council 2006, Rule 56; The General Optical Council (Fitness to Practise) Rules 2005, Rule 39

2 Section 16

If considering fear and distress, the court must take into account factors such as nature and circumstances, age, background etc etc and the court must consider any views expressed by the witness.

A further difference is the possibility of video-recorded cross-examination albeit there are many practical problems to that as it depends on full disclosure by the investigator/prosecutor and full instructions from the defendant.

Vulnerable witnesses - protections available and their pros and cons

The rules permit the following measures to enable the tribunal to receive evidence from a vulnerable witness by:

- (a) use of video links;
- (b) use of pre-recorded evidence as the evidence-in-chief of a witness, provided always that such witness is available at the hearing for cross-examination and questioning by the Committee or Panel;
- (c) use of interpreters (including signers and translators) or intermediaries;
- (d) use of screens or such other measures as the Committee or Panel consider necessary in the circumstances, in order to prevent:
 - (i) the identity of the witness being revealed to the press or the general public; or
 - (ii) access to the witness by the practitioner; and
- (e) the hearing of evidence by the Committee or Panel in private.

The rules of the various disciplinary bodies state that this list is non-exhaustive and reflects the special measures available in criminal courts.

Video link

Video-links have the advantage of reducing a witness's stress by allowing them to give their evidence away from the defendant and the hearing room. Home Office research found that 90% of vulnerable or intimidated witnesses found it helpful to give their evidence over a video link³. However a video-link does not prevent the witness from being seen by the defendant. The knowledge that the defendant is watching them as they give their evidence can upset some witnesses.

Practitioners often express concern that evidence given by video-link is not as effective as

³ Hamlyn, B, Phelps, A, Turtle, J and Sattar, G, Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses (London: Home Office Research Study No. 283; June 2004).

that given in the hearing room. Prosecutors fear that it may sanitise the evidence and lack the emotional that would come from seeing a witness in the flesh. Defence advocates fear that witnesses may be harder to 'crack'. A useful indicator is that many defenders prefer to cross-examine over the link and avoid the risk of emotional impact. That is the gut instincts of the advocates. There is no evidence to support this view. Research has shown that whilst fact-finders prefer live evidence, they do not appear to allow the use of video-links to influence their decision-making. Further, the reduction in stress may permit more accurate and coherent testimony from certain witnesses, which is the aim of the facility.

In the early stages of video links objection was sometime taken on the basis of prejudice that may be caused. There is now no meaningful objection to the use of video link. In *Polanski v Conde Nast* [the libel case Vanity Fair magazine and Roman Polanski who would not come to London for fear of being extradited to the US and sought use of video link], the House of Lords considered the issue under the civil procedure rules and found no cause for complaint. In *D v Camberwell Green Youth Court* [2005] 2 Cr App R 1, the House of Lords considered special measures for young witnesses in the criminal sphere and concluded that the legislation was ECHR compatible and the presumption was that there was nothing intrinsically unfair about giving evidence in this way.

In order to avoid the risk of the witness seeing the defendant, the government's Review of Child Evidence in 2004 considered that priority should be given to installing remote live-link equipment in those court buildings where there are greater risks of witnesses encountering the other parties and where it is preferable that the witness gives evidence by remote link from another court.

Pre-recorded evidence in chief

Video-recorded interviews often take the place of live examination in chief in disciplinary hearings and should, in principle, be conducted in line with the rules of evidence that apply in court, especially the avoidance of leading questions. If not, the interview is likely to be inadmissible for the purpose of the proceedings. The guidance states that interviews should be conducted in four phases: rapport, free narrative account, questioning and closing.

Suggestibility has been defined as 'the act or process of impressing something (an idea, attitude or desired action) on the mind of another' (Fundudis, 1997: 151). Much has been learned recently about the circumstances in which children are likely to go along with the implications of leading questions. Children are not infinitely suggestible. They cannot be encouraged to make plausible allegations with a few leading questions (Goodman et al., 1991). However, children, like all witnesses, can be vulnerable to forms of suggestion:

- the interview process has distorted their memory;
- they acquiesce to the views of the more powerful interviewer.

An influential review of experimental research by Ceci and Bruck (1993) concluded that children in general [particularly under 6] were prone to incorrect responding under certain circumstances (see McAuliff et al., 1998 for an update and critique), including the following:

Accusatory context: An action is neutral or ambiguous. If the interviewer or other authority figure repeatedly suggests they were suspicious children later reinterpreted the same acts negatively. (Leichtman and Ceci, 1995; Lepore and SESCO, 1994; Thompson et al., 1997). Gently challenging children about such beliefs can substantially reduce, but not eliminate, this problem.

Repeated suggestive interviewing: Both adult and child witnesses have been shown to be susceptible to leading questions. Repeated interviews with four to six year olds, in which leading questions were used to imply the same misleading account of events, led to free recall as well as prompted recall being affected, with convincing but false corroborating detail being offered by the child (Leichtman and Ceci, 1995).

Post-event misinformation: Both adult and child witnesses who observe an event and later read a misleading account of it will incorporate some of the misinformation into their memories of the original event. Once again, however, four to six year olds appear particularly vulnerable to this form of distortion, which influences free as well as prompted recall (Poole and Lindsay, 1995).

Memories implanted by others: In recent years there has been some concerns about false memory syndrome and the like. It appears to be much easier to change a memory than to implant a totally false one (Pezdek and Roe, 1997). However, adults repeatedly presented with a mix of real and fictitious events from their own lives will over time claim to 'remember' at least some of the fictitious events (Hyman et al., 1995). Similar effects have been demonstrated in four to six year old children, some of who claimed not only that the fictitious events had occurred, but also provided plausible supportive detail. This effect was maximised if witnesses were encouraged to visualise repeatedly each incident and were given an assurance that their parents remembered all the events (Ceci et al., 1994). However, for such effects to occur, the suggested event must be compatible with the child's previous experience and beliefs (Pezdek et al., 1998).

The type of language used in interview: It is important to match the language to the age of the child. This is a problem in the courtroom as adult language may be used. 'Jury' is something you wear around your neck. Difficult concepts include date and time, duration, frequency, measurement and location. This use of adult language and concepts can lead to inconsistent and confused answers and to an increase in incorrect responding (Carter et al., 1996). Children appear reluctant to query questions they do not understand, sometimes even when the question is not sensible. Davies et al. (1995) found that although Memorandum interviewers tailor their language to the age of the child rather better than court officials, there can still be shortcomings in the interviews (Westcott and Davies, 1996). Bull (1995) and others found that not enough interviewers use the rapport phase of the interview to establish the child's level of linguistic competence.

A particular concern is with the style of question. Walker (1993; 1994) has suggested that the following range of questioning styles can cause problems for children, and therefore should be avoided by interviewers: passive questions (e.g. 'were you chased by him?'); negative questions (e.g. 'did you not see him in the park?'); and questions containing multiple propositions (e.g. 'Did you go to your uncle's house and was he present when you took a bath?'). Walker suggests that younger children have particular problems in answering 'yes/no' questions accurately and respond better to 'wh-' questions (who, whom, what, where, when?).

The solutions are not easy. Research suggests that child witnesses should be interviewed promptly and that their suggestibility should be taken into account as well as their level of language and understanding. The rapport stage of the interview is crucial to establish this. Free recall within interviews, the consensus among researchers is that

- the quantity of children's free recall increases with age,
- the free recall is generally very accurate,
- the accuracy of reports do not vary with age, and
- the omission of details is much more common than the invention of false ones.

Interviewers are trained. They are subject to the Memorandum of Good Practice. The rapport may take some time and lead to irrelevant or inadmissible questions and answers in the interview, which may require editing.

If the assistance to vulnerable witnesses is extended, it leads to these questions: should the investigators for the regulatory bodies conduct video-recorded interviews of witnesses or should it be left to the police? If they should, what guidance? What training? What sort of interviewer? When should the defence become involved?

Interpreters/intermediaries

The role of the intermediary is to enable complete, coherent and accurate' communication. At court they are allowed to explain questions and answers to the witness but may not change the substance of evidence.

In the courts there has been a pilot scheme on the use of intermediaries. The concept is that some witnesses [child or vulnerable adults] need the assistance of a third party to help them give their evidence. Intermediaries are speech and language professionals, therapists, teachers and social and medical professionals. Their task is to assess the communication needs of the witness and establish a rapport right from the outset through to the hearing.

The intermediary will have been gone through an assessment procedure and have a code of practice and a code of ethics.

The process begins by the legal team identifying that a witness may require an intermediary. The intermediary assesses the witness' needs prior to the interview. The assessment may include external reports. The intermediary then provides advice as to the nature of the interview: room layout, breaks, how to question etc. After interview, the intermediary writes a report for the court and the parties giving suggestions as to how the witness should be treated and questioned.

A special measures application will be made. If successful, prior to giving evidence there will be a hearing with the Intermediary to sort out ground rules including not only the practicalities of breaks, TV link working but the limitations on how a witness may be questioned.

The Ministry of Justice evaluation found that almost all those who encountered intermediaries

expressed a positive experience. There are some 76 registered intermediaries and had been some 206 requests since the pilot scheme was introduced.

Screens

Unlike with a video-link, a witness who gives their evidence behind a screen will neither see or be seen by the defendant. In addition the witness's physical presence in the hearing room gives the panel a greater measure of contact with the witness. In a case of a sexual nature where it is alleged that the defendant overpowered the witness, the opportunity to assess the witness's size and bearing is important.

Increased use of witness support, witness therapy

Witness support helps witnesses by giving them emotional support in the form of someone to talk to in confidence at the hearing before they give evidence. They get the chance to familiarize themselves with court procedures, and thus reduce their anxiety when giving evidence. Supporters are able to accompany the witness into the video link room. They provide a valuable service. I understand that it is being considered by the GMC and may extend to other bodies.

Witness therapy goes further, comprising counseling and psychotherapy in addition to preparation for court. These components raise concerns that the witness's evidence will be adversely affected, as discussions of the incident may give rise to the witness:

- giving inconsistent accounts of the events in issue;
- fabricating evidence (deliberately or inadvertently);
- becoming aware of gaps or inconsistencies in their evidence;
- becoming more convinced, or convincing (but no less mistaken)

These risks mean that therapy should not take place before a video-recorded interview with the witness has been made. Should the witness's circumstances demand it, consideration may need to be given to abandoning proceedings in the interests of the well-being of the vulnerable or intimidated witness.

Therapists should be made aware of any pending criminal proceedings and the implications of using techniques, which may result in the evidence of the witness being discredited. For example, leading questions and group therapy involving the specific recounting of abuse should be avoided, as should any detailed recounting or reenactment of the incident, as it risks being seen as coaching.

As a safeguard the regulatory body should be informed that a witness has received therapy and obtain an assurance from the therapist that the witness did not say anything in therapy that is inconsistent with her statements she has made to those investigating the misconduct.

Coaching

We are aware that there is a significant difference between the US and UK systems of witness preparation. Until recently, the limit was confined to the convention and the Bar Code of Conduct that prevented a barrister from coaching a witness. The Court of Appeal in *R. v. Momodou and another* [2005] 2 Cr Ap R 6, stated that there is a dramatic difference between witness training or coaching, and witness familiarisation. Training or coaching of witnesses in criminal proceedings, whether for the prosecution or defence, is not permitted. The purpose of the rule is to minimise the risk, inherent in witness training, that a witness may tailor his evidence in light of what someone else said. It also avoids any unfounded perception that a witness may have tailored his evidence. This could be the case even where the training takes place one-to-one with someone completely remote from the facts of the case. The fear identified by the Court of Appeal is the same as that expressed above: the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. In short, it is permissible and welcome to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. [Such concerns do not apply to training of experts in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, or the developing of the ability to resist the inevitable pressure of going further in evidence than matters covered by the witness's specific expertise].

Expert opinion

There is an interesting line of research into the ability of fact-finders to distinguish the reliable and honest witness from the unreliable or dishonest. The research shows that fact-finders are influenced by non-verbal cues or body language; the body tells the truth whilst the mouth is telling lies. It is true that the body does tell the truth whilst the mouth tells lies but the fact-finder often considers the wrong part of the body and places reliance on the wrong cues. This because the dishonest witness will control those parts of his body he thinks will give him away eg being shifty. The parts he is less able to control such as tone of voice or hesitation in answering is over-looked by the fact-finder. The position is aggravated by the fact that not only does the fact-finder consider the wrong cues, the fact-finder shows confidence in their skill in distinguishing between the truthful and untruthful witness.

The DPP is keen to introduce expert evidence, not to provide direct evidence but to comment on the manner and nature of the evidence that has been provided to the fact-finder. For example, not struggling if being raped; providing more detail of events over time.

Conclusion

In their consultation paper, the Office for Criminal Justice Reform recognised that more general witnesses would be required, particularly for young people. They include:

- expansion of the Witness Service
- Witness Care Units to provide telephone support throughout the criminal justice process
- A Code of Practice for Victims published last year ensuring that victims get regular updates
- A Witness Charter setting out standards that witnesses should expect to receive [due in 2008]

I began by saying that witnesses have responsibilities. They attend when required. They wait. They answer questions. However, they also have rights. The right to give their best evidence.

2 September 2007, Sean Larkin, QEB Hollis Whiteman